In the Matter of Dorothy Nuttall, Department of Corrections
CSC Docket No. 2011-634
(Civil Service Commission, decided May 18, 2011)

Dorothy Nuttall, a Correction Sergeant with the Department of Corrections, represented by Frank M. Crivelli, Esq., appeals a fine in the amount of $465.76 imposed by the Department of Corrections.

The record reflects that the appellant was served with a Notice of Minor Disciplinary Action, charging her with a violation of a rule, regulation, policy, procedure, order or administrative decision and other sufficient cause. Specifically, the appointing authority asserted the appellant called out sick on February 25, 2010, a date on which there was significant snowfall, and she failed to present acceptable medical documentation to justify her absence. Thus, a fine of $465.76 was imposed.[1] The hearing officer found that the appointing authority issued three memoranda to employees in February 2010, notifying them that they would be required to produce medical documentation in the event that they called out sick during a snowstorm. In this instance, the appellant called out sick during a snowstorm on February 25, 2010, and she produced documentation demonstrating that her fiancé was treated in the emergency room on that date. The hearing officer found that *N.J.A.C.* 4A:6-1.3(g) permits the use of sick leave for personal illness or injury, exposure to a contagious disease, care of a seriously ill member of the employee's immediate family, or death in the employee's immediate family. Further, *N.J.A.C.* 4A:1-1.3 defines "immediate family" as "an employee's spouse, domestic partner (see section 4 of *P.L.* 2003, *c.*246), child, legal ward, grandchild, foster child, father, mother, legal guardian, grandfather, grandmother, brother, sister, father-in-law, mother-in-law, and other relatives residing in the employee's household." Since these provisions do not permit the use of sick leave to care for one's fiancé, the hearing officer upheld the charges and the penalty.

On appeal to the Civil Service Commission (Commission), the appellant contends that there is no provision in Civil Service law or rules which grants an appointing authority "the authority to demand a physician's certificate at its whim." While the appellant concedes that the appointing authority has the right to require such medical documentation where there is reason to believe an employee is abusing sick leave, the appellant maintains that it had no such reason for suspicion in the instant matter. The appellant also claims that this requirement violates her collective negotiations agreement. In addition, the appellant challenges the imposition of a fine in

[1] The appointing authority indicates that this figure represents the amount of overtime costs incurred by the appellant's absence.

this matter, contending that *N.J.A.C.* 4A:2-2.4 provides that fines may only be imposed as a form of restitution, in lieu of suspension where the appointing authority establishes that a suspension would be detrimental to the public health, safety or welfare, or where an employee has agreed to the imposition of a fine. Finally, the appellant asserts that, unlike other similarly situated officers, she was not afforded the opportunity to change her sick day to an administrative leave day.

In response, the appointing authority first asserts that the appellant's appeal was untimely. It claims that she received the decision of the hearing officer on May 27, 2010, but she did not file an appeal of that decision until November 1, 2010.[2] Moreover, the appointing authority argues that the appellant has not met the standard for review of minor disciplinary actions. It asserts that it appropriately required medical verification for sick leave utilized during periods of inclement weather, and it contends that the timing of the sick leave provided it with a reasonable belief that employees were abusing sick leave. Moreover, the appointing authority maintains that it appropriately imposed fines, "given the large number of employees at issue, the fact that they are essential, the fact that suspension time results in overtime costs, and the fact that the Department did not wish to incur overtime costs in addition to that already generated by their call-outs during the snow storm." The appointing authority also notes that the Merit System Board (Board) previously upheld the imposition of fines in similar circumstances in *In the Matter of Edward Aguilar* (MSB, decided March 9, 1999). Further, it underscores that it had 1,552 employees call out sick during the February 2010 snowstorms, and it resulted in the payment of several hundred thousand dollars in overtime. Of those 1,552 employees, approximately 650 failed to provide medical documentation. The appointing authority asserts that, if it were now required to suspend these 650 employees, it would incur another several hundred thousand dollars in overtime costs and face an "extreme operational challenge."

Additionally, the appointing authority submits a certification from Kenneth C. Green, the Director of its Office of Employee Relations. Green avers that he issued memoranda to all Directors of Custody Operations and to the presidents of all affected collective negotiations units on February 9, 10, and 25, 2010, notifying them that employees would be required to present medical verification if they utilized sick time from 10:00 p.m. on February 9, 2010 through 2:00 p.m. on February 11, 2010 and from 10:00 p.m. on February 24, 2010 through 10:00 p.m. on February 26, 2010. Employees were given seven days to produce their medical documentation. Green also

[2] This is the date on which the parties were notified of the pendency of this appeal and given the opportunity to submit additional information within 20 days.

emphasized that employees were notified that they could convert their sick time to administrative, vacation or compensatory time if they wished.

It is noted that, while the hearing officer's decision is dated May 27, 2010, it does not appear that the appellant received notice of the decision until June 28, 2010, at the earliest. In this regard, the "Appeal of Minor Disciplinary Action" form, which notified the appellant of the appointing authority's final decision and her appeal rights, was signed by the appointing authority on June 28, 2010. The appellant's letter of appeal is dated August 3, 2010.

CONCLUSION

N.J.A.C. 4A:2-3.7(a) provides that minor discipline may be appealed within 20 days of the conclusion of departmental proceedings. Since this time frame is not statutory, it can be relaxed by the Commission. *See N.J.A.C.* 4A:1-1.2(c). As an initial matter, the appointing authority objects to the consideration of the appellant's appeal as untimely. The record reflects that the appointing authority signed the "Appeal of Minor Disciplinary Action" form, which notified the appellant of the appointing authority's final decision and her appeal rights, on June 28, 2010. There is no definitive indication in the record as to when the appellant received this form. The record reflects that she filed her appeal by letter dated August 3, 2010. Since the June 28, 2010 form contains no indication of when it was received, and the appointing authority does not provide a date of service, the Commission will entertain the appellant's appeal as timely.

N.J.A.C. 4A:2-3.7(a) further provides:

> 1. The Commissioner [of Personnel] shall review the appeal upon a written record or such other proceeding as the Commissioner directs and determine if the appeal presents issues of general applicability in the interpretation of law, rule or policy. If such issues or evidence are not fully presented, the appeal may be dismissed and the Commissioner's decision will be a final administrative decision.
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> 2. Where such issues or evidence under (a)1 above are presented, the [Merit System] Board will render a final administrative decision upon a written record or such other proceeding as the Board directs.

This standard is in keeping with the established grievance and minor disciplinary procedure policy that such actions should terminate at the departmental level.

It is noted that, effective June 30, 2008, *N.J.S.A.* 11A:2-16 was amended, providing for the review of minor discipline in State service by the Civil Service Commission. Hence, the instant matter is being reviewed by the Commission in lieu of the Commissioner of Personnel.

Moreover, in considering minor discipline actions, the Commission generally defers to the judgment of the appointing authority as the responsibility for the development and implementation of performance standards, policies and procedures is entrusted by statute to the Department of Corrections. The Commission will also not disturb hearing officer credibility judgments in minor discipline proceedings unless there is substantial credible evidence that such judgments and conclusions were motivated by invidious discrimination considerations such as age, race or gender bias or were in violation of Civil Service rules. *See e.g., In the Matter of Oveston Cox* (CSC, decided February 24, 2010). In the instant matter, the appellant challenges her fine on two primary bases: that the appointing authority improperly required the submission of medical documentation for her absence during a snow storm in February 2010 and that the appointing authority improperly imposed a fine for her infraction. As these two bases constitute issues of general applicability in the interpretation of Civil Service law and rules, this matter will be reviewed by the Commission.

N.J.A.C. 4A:6-1.4(d) provides:

> (d) An appointing authority may require proof of illness or injury when there is a reason to believe that an employee is abusing sick leave; an employee has been absent on sick leave for five or more consecutive work days; or an employee has been absent on sick leave for an aggregate of more than 15 days in a 12-month period.

Here, the appointing authority contends that it possessed a reasonable belief that employees who utilize sick leave during a period of significant snowfall are abusing sick leave. In other words, due to the increased amount of sick calls received during such weather events, the appointing authority asserts that it was reasonable for it to believe that these employees were not utilizing sick leave for its intended purpose, *i.e.,* because of their own illness or to care for an ill member of their immediate family. The appellant has not presented any persuasive arguments to convince the Commission that the appointing authority's suspicion of widespread sick leave abuse was not reasonable in

this instance. Moreover, in *In the Matter of Edward Aguilar, supra,* the Board upheld a similar requirement. In *Aguilar,* the Department of Corrections suspected sick leave abuse due to an inordinate amount of sick calls on May 5, 1997. As a result of its suspicion of a concerted "sick out," the Department of Corrections required all employees on sick leave on that date to produce medical verification of their illness, and the Board upheld the imposition of minor disciplinary fines for all employees who were unable to produce such verification. Similarly, in this case, the appointing authority reasonably suspected abuse, due to the inordinate amount of employees who called out sick on the dates in question, as well as the fact that there was inclement weather on the dates in question. Even more compelling is the fact that the appellant here was notified *in advance* of the requirement that she must produce a doctor's note to verify her medical inability to work on the date in question. It is noted that *N.J.A.C.* 4A:6-1.4(d) does not require that an employee be notified of the medical verification requirement prior to the absence. Accordingly, the Commission finds that the appointing authority's policy complied with *N.J.A.C.* 4A:6-1.4(d).

Further, as noted in the hearing officer's decision, the appellant's documentation in this instance did not meet the standard for use of sick leave. Specifically, *N.J.A.C.* 4A:6-1.3(g) permits the use of sick leave for personal illness or injury, exposure to a contagious disease, care of a seriously ill member of the employee's immediate family, or death in the employee's immediate family. Further, *N.J.A.C.* 4A:1-1.3 defines "immediate family" as "an employee's spouse, domestic partner (see section 4 of *P.L.* 2003, *c.*246), child, legal ward, grandchild, foster child, father, mother, legal guardian, grandfather, grandmother, brother, sister, father-in-law, mother-in-law, and other relatives residing in the employee's household. In the instant matter, the appellant presented medical documentation relating to her fiancé's medical emergency on February 25, 2010; this situation does not fit within any of the permissible reasons for utilizing sick leave within *N.J.A.C.* 4A:6-1.3(g).

Additionally, concerning the propriety of the imposition of fines in this matter, *N.J.A.C.* 4A:2-2.4(c) provides:

> An appointing authority may only impose a fine as follows:
> 1. As a form of restitution;
> 2. In lieu of a suspension, when the appointing authority establishes that a suspension of the employee would be detrimental to the public health, safety or welfare; or
> 3. Where an employee has agreed to a fine as a disciplinary option.

See also, N.J.S.A. 11A:2-20. The Commission emphasizes that this matter is strikingly similar to the facts presented in *Aguilar, supra,* where the Board upheld the imposition of fines. In *Aguilar,* the Board found that the large numbers of employees who called out sick on the same date were "successful in imposing significant costs in overtime and the administration of overtime on the Department. Thus, the fines can be considered a form of restitution." Further, the Board noted:

> Moreover, suspending, rather than fining the officers for their participation in the "sick out" would produce the same calamitous situation that the appointing authority is trying to correct. It is true that in prior matters, the Board has never held that the suspension of an employee in a large institution would be detrimental to the public health, safety or welfare. This policy has been upheld by the courts. *See, e.g., In the Matter of Sandra Fraser,* Docket No. A-3886-88T1 (App. Div. April 5, 1990). However, these matters all involved single employees, not the instant situation where a large number of employees would be disciplined for the same infraction. Notwithstanding the ability of the institution to stagger suspensions, the use of suspensions under these circumstances would still have a significant adverse impact on the public health, safety and welfare. *Id.* at 5.

The situation presented in this matter is analogous to that presented in *Aguilar,* and the Commission concurs that the imposition of a fine in this matter was appropriate for the reasons stated above. *See also, In the Matter of Joseph DiMemmo,* Docket No. A-2025-08T1 (App. Div. January 13, 2010).

Moreover, the appellant contends that the discipline imposed in this case violated the terms of her collective negotiations agreement. The Commission does not have jurisdiction to enforce or interpret grievance procedures or other items which are contained in a collective bargaining agreement negotiated between the employer and the majority representative. *See In the Matter of Jeffrey Sienkiewicz, Bobby Jenkins and Frank Jackson,* Docket No. A-1980-99T1 (App. Div., May 8, 2001). The proper forum to bring such concerns is the contractual grievance procedure.

Finally, the appellant asserts that she was not provided the opportunity to convert her use of sick leave on February 25, 2010 to administrative leave time. The appointing authority maintains that all employees were given the opportunity to utilize administrative or vacation leave in lieu of sick leave on the dates for which fines were imposed. The appellant has not supplied any evidence to demonstrate that she was

excluded from this policy. Furthermore, even if she was not given such an opportunity, there is no requirement in Civil Service law or rules that an employee be permitted to substitute administrative or vacation leave where they inappropriately called out sick.

Accordingly, the Commission finds no merit to the appellant's claims, and her appeal is hereby dismissed.

ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.